

<p>LT. COL. RICHARD L. MILLER,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>DR. JAMES G. ROCHE,</p> <p>SECRETARY OF THE AIR FORCE,</p> <p style="text-align: center;">Defendant.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Civil Action No. 03-1742 (RMC)</p>
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On August 15, 2003, Lieutenant Colonel Richard L. Miller, United States Air Force, filed suit under 10 U.S.C. § 628 and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-706, seeking an appointment to Senior Service School (“War College”). Lieutenant Colonel Miller claims that the Air Force’s decision not to appoint him to the War College was procedurally flawed. He contends that the Court may properly order an appointment to remedy these procedural defects and redress persistent professional obstacles caused by an error committed in an earlier promotion decision.

BACKGROUND

From 1990 to 1994, Lieutenant Colonel Miller, then Major Miller, was attached to the United States Central Command (“CENTCOM”). CENTCOM is a “joint” service command in which military personnel work with, and are supervised by, officers from the various services. According to Lieutenant Colonel Miller, the promotion recommendation process in this “joint command environment” was “especially convoluted.” AR 14-15. As a result, a number of Army officer evaluations were not considered during his 1992 and 1993 lieutenant colonel promotion boards and “severely lessened his competitiveness for a [Definitely Promote] recommendation[.]” AR 17. After receiving only “Promote” recommendations, then-Major Miller was twice “non-selected” for promotion and was scheduled for mandatory retirement. AR 15.

Prior to his scheduled retirement, then-Major Miller initiated an appeal with the Air Force Board for Corrections of Military Records (“Corrections Board”). He asked that it amend the Promotion Recommendation Forms in his file to reflect an overall recommendation of Definitely Promote instead of Promote. AR 25, 28. His appeal alleged that the promotion boards erroneously considered an incomplete file in reaching their Promote recommendation. Promotion to the rank of colonel is highly competitive and, absent a Definitely Promote recommendation, unlikely. While his appeal was pending, then-Major Miller was involuntarily retired on September 1, 1994.

After more than two years of delay, the Corrections Board acknowledged that his records “did not include his Army officer evaluations” and recommended on August 15, 1996 that the promotion recommendation decision be revisited and determined on a more complete record. AR 24, 25. The Corrections Board also recommended that he be given consideration for promotion to lieutenant colonel by a Special Selection Board if the Management Level Evaluation Board determined that he should have received a Definitely Promote recommendation.

Almost three years after this initial determination by the Corrections Board, the Air Force Personnel Center notified Mr. Miller that his Promotion Recommendation Forms had been upgraded to Definitely Promote. On May 29, 1999, a Special Selection Board selected him for promotion to the grade of lieutenant colonel retroactive to March 1, 1994. Although Lieutenant Colonel Miller had been in forced retirement since September 1994, he requested and was given leave to return to active duty in the fall of 1999.

Concerned that a six-year gap in his service record could hamper his professional aspirations, on August 14, 1999, Lieutenant Colonel Miller submitted an addendum to his original appeal to the Corrections Board, seeking “reconstitution of [his] Official Personnel Record to show competitive and productive continuous service” and consideration for promotion to colonel at the date of first eligibility. AR 30. On November 2, 1999, the Corrections Board responded, refusing to “manufacture” performance reports to cover the six-year break in service. It did, however, fashion a partial cure, recommending that an Air Force Form 77 be inserted into Lieutenant Colonel Miller’s record to indicate that no performance reports were “available for the period when he was not serving on active duty,” *id.*, along with a statement that “[r]eports for this period [are] not available for administrative reasons which were not the fault of the member.” AR 31. That same day, the designee of the Secretary of the Air Force issued an order (“1999 Secretarial Order”) that adopted the recommendations of the Corrections Board.

Having received and considered the recommendation of the Air Force Board for Correction of Military Records . . . , it is directed that:

The pertinent military records of the Department of the Air Force relating to RICHARD L. MILLER . . . be corrected to show that:

- a. He was not retired on 1 September 1994 in the grade of major, but on that date was continued on active duty and was ordered permanent

change of station to his home of record (home of selection) pending further orders.

b. An AF Form 77, Supplemental Evaluation Sheet, be prepared and inserted in the record in its proper sequence indicating that no performance reports are available for the period when he was not serving on active duty and containing the statement, "Reports for this period not available for administrative reasons which were not the fault of the member."

c. Any nonselections for promotion to the grade of colonel in the primary zone prior to receiving a minimum of two Officer Performance Reports in the grade of lieutenant colonel be, and hereby are, set aside.

AR 32. The final provision of the 1999 Secretarial Order was fashioned to help ensure that Lieutenant Colonel Miller had an opportunity to demonstrate his fitness for promotion to the rank of colonel.

Although the 1999 Secretarial Order contained a number of remedial measures, Lieutenant Colonel Miller considered them inadequate to repair the damage caused during his six-year hiatus from active duty. Specifically, Lieutenant Colonel Miller believed that his opportunity for promotion and advancement was curtailed because he was not considered for selection to the War College during this six-year period. Resident attendance at the War College is a critical consideration in the decision to promote a lieutenant colonel to colonel. Lieutenant Colonel Miller was not considered for selection because the Military Education Branch of the Air Force Personnel Center was unwilling or unable to reconstruct the selection processes for the War College that had occurred during Lieutenant Colonel Miller's gap in service.

In an attempt to gain access to the War College, Lieutenant Colonel Miller petitioned the Corrections Board on April 16, 2001 for "full and complete correction" of his official personnel

record to “provide[] equality within the peer group assigned . . . (Jul 93).”¹ AR 46. And, because “the deficiency in [his] official military record cannot be overcome” by the Air Force Personnel Center, Lieutenant Colonel Miller also asked the Corrections Board to order his selection for the War College. *Id.*

In February 2002, the Corrections Board declined to recommend a direct appointment to the War College, disagreeing that this relief was contemplated by the 1999 Secretarial Order. AR

10. It reasoned:

Applicant and counsel seem to be seeking relief that will totally eradicate the existence and impact of the applicant’s break in service [T]he correction process can only go so far to make an individual whole. The corrections to his record have necessarily created the situation of which he now complains. Retroactive dating to establish new dates of rank and pay dates to rectify errors or injustices is an integral part of the correction process. Yet, the down side of that process is that the officer qualifies for promotion consideration without having had the opportunity to build the record of performance that has been an ongoing process for his contemporaries. Nevertheless, when it becomes necessary to effect corrections involving the establishment of retroactive dates of rank, once made, those corrections must be accepted as final and conclusive for all purposes. Just as importantly, the process must end. Not every potential contingency or byproduct of the correction process can be remedied.

Many of the items requested . . . seek to have the Board establish special rules or disregard existing rules and regulations to provide the applicant with the relief he is seeking . . . [including selection for the War College]. We do not support this approach He may never fully recover from the effects of a six-year gap in service. On the other hand, there is no guarantee that he would have attained the grade of colonel had he not suffered the errors and/or injustices that led to his separation from service. Hundreds of fully qualified officers who compete for promotion on a best-qualified basis do not attain the grade of colonel due to the limited number of promotion vacancies. Accordingly, we believe that any future promotions

¹ Upon his return to active duty, Lieutenant Colonel Miller was placed in the group of Air Force officers of his then-rank as of July 1993 for purposes of comparison and consideration for promotion.

must be earned through the well established process that now exists and that the applicant has been provided the best opportunity that we can afford him, based on the circumstances, to compete and that no further relief is warranted.

AR 10. Although it found that direct appointment was not appropriate, the Corrections Board did fashion specialized relief for Lieutenant Colonel Miller. It recommended that a Special Selection Board consider him for the War College and set aside any existing non-selections for promotion to the grade of colonel.²

As recommended by the Corrections Board, the Air Force Personnel Center convened a Special Selection Board in September 2002 to consider Lieutenant Colonel Miller's candidacy for the War College. This process involved a competition on paper between Lieutenant Colonel Miller's record and the benchmark records of officers who were actually considered for appointment to the War College in 1993, the last year before his break in service. Lieutenant Colonel Miller's record and the benchmark records against which he was compared were limited to Officer Performance Reports and decorations. Two Air Force personnel forms and the Officer Selection Briefs were excluded from all records, in part because comparison records could not be located or reconstructed, and in part to preserve his anonymity. AR 316. The Special Selection Board did not select Lieutenant Colonel Miller for resident attendance at the War College. *Id.*

Despite the September 2002 Special Selection Board's decision not to select, Lieutenant Colonel Miller petitioned the Corrections Board in February 2003 for a direct appointment to the War College. He argued that the Air Force Personnel Center had failed to

² The record is unclear as to whether Lieutenant Colonel Miller had any non-selections for promotion to colonel as of February 2002. If so, this remedy was not insignificant. As his prior career demonstrates, upon the event of two non-selections for promotion, an Air Force officer is retired from active service.

comply with the February 2002 Corrections Board directive because the process it employed violated various Air Force directives. The Air Force Personnel Center then requested a determination from the Corrections Board as to whether it had fully satisfied the February 2002 directive. On June 6, 2003, the Corrections Board issued an advisory memorandum to the Air Force Personnel Center stating that “[i]t is our determination that the actions taken as noted in your 11 Apr. 2003 memorandum fully satisfy our directive.” AR 327. The Corrections Board informed Lieutenant Colonel Miller that it was denying his request for a direct appointment to the War College because “the Board previously considered this request and declined to grant it. Consequently, it will only be reconsidered should he submit new and relevant evidence.” *Id.*; *see also* AR 320.

Lieutenant Colonel Miller filed suit in August 2003, seeking a judicial decree ordering the Air Force to send him to residential War College. He advances “two separate and distinct assertions.” Pltf.’s Motion at 11. First, he argues that the September 2002 Special Selection Board was “fundamentally flawed” because its procedures were invalid and because the “justification for not voiding the denial of [War College] by the [Special Selection Board] did not provide sufficient basis for the Court to make a determination of appropriateness under 10 U.S.C. § 628(g)(2).” *Id.* Second, he argues that his request for a direct assignment to the War College was proper and that the Corrections Board’s “justification for not granting such relief was deficient as it provided no rationale . . . except that the [Air Force Personnel Center] had done what was required of it.” *Id.*

LEGAL STANDARDS AND ANALYSIS

Summary judgment is appropriate when “the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.³ FED. R. CIV. P. 56(c). See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995). To determine if a fact is material, a court must look to the substantive law on which each claim rests. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Any factual dispute must be capable of affecting the substantive outcome of the case to be “material” and “genuine.” *Id.* at 247-48. A party opposing summary judgment “may not rest upon the mere allegations or denials of his pleadings, but . . . must set forth specific facts showing that there is a genuine issue for trial.” *Id.* at 248.

JURISDICTION

Lieutenant Colonel Miller claims that, despite the Air Force’s subsequent remedial measures, he continues to be plagued by the initial erroneous decision not to promote him from major to lieutenant colonel. He argues that, because of the six-year gap in service, he missed the normal career window for consideration for the residential War College – training that is a critical factor in promotion decisions. He proposes that an order placing him in the War College is the appropriate and necessary relief. As an initial matter, the Court must determine whether it may properly consider the merits of his claim and issue such an order.

³ Defendant has moved to dismiss Lieutenant Colonel Miller’s complaint for failure to state a claim upon which relief can be granted and, in the alternative, for summary judgment. Because Defendant’s motion to dismiss relies upon the administrative record and because the facts are not in material dispute, the Court will treat it as a motion for summary judgment. See FED. R. CIV. P. 12(B)(6) (motion to dismiss for failure to state a claim “shall be treated as one for summary judgment and disposed of as provided in Rule 56” where “matters outside the pleadings are presented to and not excluded by the court”). See *Richardson v. Rivers*, 335 F.2d 996, 998 (D.C. Cir. 1964) (same).

A court should not substitute its judgment regarding the merits of military personnel decisions for that of the Armed Forces Secretary. Such decisions are discretionary “within the province of the President as Commander in Chief” and courts “have never assumed by any process to control the appointing power either in civilian or military positions.” *Orloff v. Willoughby*, 345 U.S. 83, 90 (1953). Judicial intervention is not appropriate because “judges are not given the task of running the [military, which] . . . constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters.” *Id.* at 93-94.

An order directing an appointment to a coveted, competitive, and career-enhancing position in the War College would impermissibly intrude upon the province of the executive branch. Furthermore, beyond any concerns regarding the separation of powers, it is a simple truth that a “court is not competent to compare [plaintiff] with other officers” *Kreis v. Sec’y of the Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1995). Because this action “falls squarely within the realm of nonjusticiable military personnel decisions[,]” *id.* at 1511, this Court is “powerless to act,” *Homer v. Roche*, 226 F. Supp. 2d 222, 225 (D.D.C. 2002), and will not order the Air Force to appoint Lieutenant Colonel Miller to the War College.

ADMINISTRATIVE PROCEDURE

While the Court is limited in its ability to compel personnel decisions, the Court may properly evaluate the reasonableness of a decision and set aside an action under certain circumstances. Under the Administrative Procedure Act, an agency’s action may be set aside if it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C.

§ 706(s)(A); see *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The standard of review under the APA is narrow; it is even narrower in cases involving review of military personnel decisions.⁴ See *Kreis*, 866 F.2d at 1513-14 (“unusually deferential” application of the arbitrary and capricious standard); *Cargill v. Marsh*, 902 F.2d 1006, 1008 (D.C. Cir. 1990) (“heightened deference” owed to Corrections Board decision); *Viles v. Ball*, 872 F.2d 491, 495 (D.C. Cir. 1989) (“The standard for review of Board judgments is exceptionally deferential.”). “[O]nly the most egregious decisions” should be set aside by the courts. *Kreis*, 866 F.2d at 1514.

The determination on review is whether the decision making process was deficient, not whether the decision was correct. *Dickenson v. Sec’y of Defense*, 68 F.3d 1396, 1405 (D.C. Cir. 1995). See also *Kreis*, 866 F.2d at 1512 (“[W]e require only that the agency exercise its discretion in a reasoned manner, but we defer to the agency’s ultimate substantive decision.”). That the Court is deferential does not mean that it is a rubber stamp of approval. “The military’s discretion may be broad, but . . . it is not boundless.” *Homer*, 226 F. Supp. 2d at 226 (examining the standard of

⁴ The APA, 5 U.S.C. § 706(2) states that a reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be:

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

5 U.S.C. § 706(2).

review under 10 U.S.C. § 628(g)(2)).

1. Corrections Board Decision Denying Direct Appointment Was Proper

Lieutenant Colonel Miller argues that the Corrections Board provided an insufficient justification for denying him a direct appointment to the War College. Opp. at 11. As the record is replete with reasons for this denial, Lieutenant Colonel Miller's argument is unfounded.

On February 15, 2002, the Corrections Board refused to recommend a direct appointment for Lieutenant Colonel Miller to the War College. Instead, it directed that a Special Selection Board be convened to compete Lieutenant Colonel Miller's record against those of his 1993 peers. The Corrections Board explained its decision at length and found that its role was not to "totally eradicate the existence and impact of [Lieutenant Colonel Miller's] break in service[.]" AR 10. Rather, "the correction process can only go so far to make an individual whole." *Id.* Furthermore, it did "not support" his proposals to have the Corrections Board "establish special rules or disregard existing rules and regulations" so that Lieutenant Colonel Miller could be appointed to the War College. *Id.*

In March 2002, Lieutenant Colonel Miller requested *de novo* review of this decision, AR 227, which was denied by the Corrections Board on April 9, 2002. AR 234. In June 2003, the Corrections Board again refused to recommend him for direct appointment to the War College, stating that it had previously denied the request and that Lieutenant Colonel Miller had presented no new information or evidence justifying reconsideration. AR 327, 320.

Under the deferential standard of review applicable here, the Court finds that the Corrections Board's February 2002 decision was not arbitrary or capricious and was adequately explained. It was not necessary to repeat the entire rationale in its April and June denials of

Lieutenant Colonel Miller's requests for reconsideration. *See* AR 320, 10.

2. *2002 Special Selection Board Decision Denying Selection Was Not Flawed*

Lieutenant Colonel Miller also argues that the decision of the 2002 Special Selection Board that denied his selection to the War College was tainted by improper procedures. Specifically, he alleges that the Special Selection Board did not follow statute and regulation because it did not "have before it Plaintiff's record 'as that record would have appeared to the board that should have considered him.'" *Opp.* at 15 (quoting 10 U.S.C. § 628(a)(2)).

Lieutenant Colonel Miller correctly notes that the record was not identical to the one that would have existed in 1993. However, 10 U.S.C. § 628(a)(2) prescribes only the procedures for a Special Selection Board convened to determine "whether [a] person (whether or not on active duty) should be recommended for promotion." 10 U.S.C. § 628(a)(1). The 2002 Special Selection Board determined not whether he should be promoted, but whether he should be selected for resident attendance at the War College.⁵

As the Director of Personnel Program Management explained, a truncated record was necessary to ensure anonymity and ensure that the comparison of Lieutenant Colonel Miller's record

⁵ Although not applicable here, federal courts have explicit jurisdiction to review the actions of a Special Selection Board in promotion determinations. 10 U.S.C. § 628(g)(2) states that a court may set aside the action of a special selection board if the court finds that the action was:

- (A) arbitrary or capricious;
- (B) not based on substantial evidence;
- (C) a result of material error of fact or material administrative error; or
- (D) otherwise contrary to law.

10 U.S.C. § 628(g)(2).

to the benchmark records was properly calibrated.

The SSB that convened on 9 Sep 02 did not select you for Senior Service School (SSS) [War College] designation by the CY 93 (1 Nov 93) board. Your Officer Selection Record (OSR) and the “benchmark” OSRs were limited to Officer Performance Reports (OPRs) and decorations. Although AF Form 90s were used during the Fall 1993 PME board, as temporary forms, they were not retained with the benchmark records nor filed electronically. Likewise, while we have every reason to believe OSBs were used during the fall 1993 PME board, this form is not electronically stored, maintained by the National Personnel Record Center (NPRC), or officially maintained by my SSB Section for PME boards. Additionally, since the AF Form 3849 was not used during the Fall 1993 PME board, we are prohibited from introducing it into consideration based on the fact that it was not used during the original board. It was determined that use of the AF Form 90 (*Officer Assignment Worksheet*), AF Form 3849 (*PME/AFIT Officer Worksheet*) and Officer Selection Brief (OSB), would be excluded to preserve your anonymity.

AR 316.⁶ Under such conditions, the Court cannot find that the effort by the Air Force Personnel Center to create the conditions for a proper decision was arbitrary, capricious, or in derogation of law. The explanation for the use of a truncated record provided is rational, even if intensely frustrating for Lieutenant Colonel Miller.⁷

⁶ In this same letter, the Air Force suggested, “if your Senior Rater nominates you as a non-candidate for CY 1994, 1995, 1996, and 1997 [War College] designation, you will be considered by a future [Special Selection Board] . . . [and] you will be scheduled to meet the first available [Special Selection Board].” AR 315. However, by letter dated March 25, 2003, Lieutenant General Steven R. Polk notified the Air Force Personnel Center that he is “not able to re-construct data to compare [Lieutenant Colonel Miller] against year group peers [for CYs 1994, 1994, 1996, and 1997]. Consequently I am not able to make a recommendation on non-candidate status for those years.” AR 294.

⁷ Lieutenant Colonel Miller had the opportunity to and did submit a letter to the 2002 Special Selection Board clarifying his record. It stated: “I have been advised by the Board’s Directorate that my selection jacket will not contain a replicated 1993 or later Officer Selection Brief (OSB), or any other nomination document otherwise available in 1993 or later I am providing herein the critical information that has been artificially omitted from my official selection folder.” AR 317.

3. *Failure to Provide Rationale for Special Selection Board Decision Requires Remand*

Although a rational basis exists for the use of an incomplete file, the record of the denial by the Special Selection Board is infirm. The official decision of the 2002 Special Selection Board, dated October 22, 2002, states only that “[t]he SSB that convened on 9 Sep 02 **did not select** Lieutenant Colonel Miller for Senior Service School (SSS) [War College] designation by the CY 93 (1 Nov 93) board.” AR 251 (emphasis in original). This cryptic message provides no rationale for the decision not to select Lieutenant Colonel Miller for resident attendance at the War College.

The Court is left with no basis for determining whether this decision was arbitrary and capricious, or fully reasoned. *See Dickenson*, 68 F.3d at 1405-06 (“But we cannot determine whether the decision making process was deficient until we are allowed to understand what that process was.”). Because the record provides no basis to determine whether the 2002 Special Selection Board was arbitrary or capricious in its refusal to designate Lieutenant Colonel Miller to Senior Service School, its decision will be vacated and remanded to the Air Force for further consideration consistent with this opinion. *See id.* at 1407 (vacating and remanding where agency failed to provide reasoned decision). *See, e.g., Homer*, 226 F. Supp. 2d at 226 (remand proper where Air Force failed to provide an explanation of its decision; permitted to affirm earlier decision if it articulated its reasons).

CONCLUSION

The plaintiff’s motion for summary judgment is granted in part and denied in part. It is denied insofar as Lieutenant Colonel Miller asks the Court to order the Air Force to send him to a Senior Service School. It is granted insofar as it asks the Court to require a reasoned decision

from the 2002 Special Selection Board. The defendant's motion for summary judgment is denied.

A separate order accompanies this opinion.

DATE: November 4, 2004.

/s/
ROSEMARY M. COLLYER
United States District Judge